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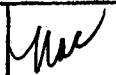
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Arizona Corporation Commission

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In the matter of :

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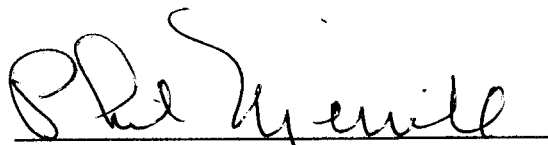
Philip William Merrill
3788 N 156 Dr.
Goodyear, AZ 85338
CRD # 2436444

EXCEPTIONS TO THE RECOMMENDATIONS
OF THE ADMINISTRATIVE LAW JUDGE
PHILIP J. DION III, DTD. 16 OCTOBER 2003

Respondent

The following provides exceptions and clarifications to ensure a complete and factual understanding of events and actions. Statements are listed to correspond to the subject recommendations by Judge Dion dated 16 October 2003 as well as in response to the Securities Division calculation of restitution for Viola Brotherson, dtd. 31 October 2003. References are made to Testimony and Exhibits wherever necessary and appropriate.

Respectfully submitted this 14th day of November, 2003


Philip William Merrill
Respondent

The testimony and evidence do not support a request for any restitution to Beatrice Du Chene for the following reasons:

1. During a visit to the client's home in Sun City, the Respondent discussed buying the shares of GE stock based on MSDW and other N.Y. analysts recommendations at the time. He also testified that both a buy price or better was recommended **as well as a sell price** to protect any gain and to avoid any significant lost in the event of a downturn in price. To quote Mr. Don Worden, a nationally recognized technical analyst , **" the time to invoke a rule of how, when and under what circumstances you will sell is before you even buy the stock"**. After a thorough explanation addressing risk, reward and cost, refs., TR pg.1588, lines 1-25, TR pg. 1589,lines 1-8, the client did approve the transactions including a buy and sell price or better. At no time did the client ever mention to the Respondent that she had worked for GE or wished to simply buy and hold the stock. This would have violated the basic rule of investing which is to make money. The "buy and hold" philosophy has proven in recent years to be disastrous for many investors particularly for the elderly. Ask any Enron or World Com investor, ref. MSN.com report, dtd. 11 November 2003, *"Why buy and hold is baloney"*, by Tim Middleton. If the stock was to be held indefinitely at the request of the client, the stock certificate would have been "ordered out" of her account, i.e., sent directly to the client. It was not. Also if the stock had not been sold, the client would have today a lost in her GE investment.

2. At no time prior to the Respondent's recommending the GE stock did the client request shares of GE to be bought and placed in her MSDW account which commenced on 12 November 1990, ref. Exhibit S-2, ACC 00245. Why after seven years did she suddenly become emotionally attached to a company that she testified she worked for for only a year, but couldn't even recall what year, ref, TR pg. 30, lines 10-13? Nor could the client offer credible evidence as to why she bought it other than based solely on what was offered by Mr. Merrill to support his recommendation. This clearly makes the client's quoted remarks in para. 49 of the ALJ Opinion appear contrived and therefore not credible.

3. The client was asked by Judge Dion if she expected any restitution, & she stated in testimony, no., Ref. TR pg. 253, lines 17-23. This was further affirmed by Judge Dion on TR pg. 466, lines 11-13, lines 16-24 & again on TR pg. 468, lines 18-20 of her testimony.

4. The GE stock investment was clearly consistent with the capital appreciation and income financial objectives stated on both the client new Dean Witter account forms, refs. Exhibit S-2, ACC 00245 & ACC 00488 as well as her Trust Certification form (ref. Exhibit R-2, pg. 1050), all of which the client had signed. After the buy of GE took place on March 6, 1997 (\$ 5,303.10) ref. Exhibit S-8, ACC 00282 & 00339, and on July 16, 1997 (\$ 2,253.33) ref, Exhibit S-8, ACC 000290 & 00345, the sale took place on 18 December 1997 for \$ 9,508.41 ref. Exhibit S-8, ACC 00300 & 00353 with a **25.8% gain of \$1,951.98**. The client soon after received a confirmation of each trade yet did not raise any objection until March 1998 when she was preparing her taxes. At any time after the sale, the client could have repurchased the stock, even more shares, with the increased proceeds from the previous sale. She chose **not** to do it, and made no effort to repurchase as verified by a letter from Morgan Stanley Dean Witter (Keith Guilfoyle) dtd. 19 November 1999 which finding also served to reject any claim by the client for restitution from MSDW. She waited a full year to repurchase the GE stock, on 17 December 1998 in her Trust account, ref. Exhibit S-16, ACC 00498 & 00512 and then directed the Respondent to make the trade. It is also MSDW's policy to not make any reimbursement for a contested trade that made money for the client.

5. The client's total **gain** (realized and unrealized) on all investments recommended by the Respondent equaled **\$ 207,824** ref. Exhibit R-2A, pg. 1095 at the time the client transferred her accounts from the Respondent which was December 1998. This represented an annualized return of **28.1 %**. Since Mr Merrill did not serve as a trustee or a fiduciary for this client (see MSDW Guilfoyle testimony TR pg. 2011, lines 24-25 & TR pg. 2112, lines 1-2), the validity of his efforts should be evaluated, not in isolation, but in the context of the whole portfolio under his management which is consistent with the Arizona Prudent Investor Act, ARS # 14-7601 et. seq.

6. Based on the above, the GE transaction was approved and fully consistent with the client's financial objectives. It did not lose any value but made an excellent return, and therefore, it does not warrant any restitution.

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Lines 11 – 23 Restitution Viola Brotherson

The issue regarding unauthorized transaction was well argued and countered by both Respondent and client testimony and dismissed by Judge Dion, see his recommendation page 23, lines 8-9.

The evidence put forth to justify any restitution for this client is based solely on unsuitability and is without merit for the following reasons:

1. The client's account (opened July 1990 in Iowa), ref. Exhibit S-19, ACC 01529 was transferred to the Respondent in 1996, ref. Exhibit S-19, ACC 04632. Her documented financial objective was aggressive income, ref. Exhibit S-19, ACC 01529 yet she already had considerable monies invested (**66.7 %** of her total account value), refs. Exhibit S-24, ACC 04360 in three **growth** mutual funds, ref. Exhibit S-24, ACC 04360 which was **inconsistent** with her stated financial objective. When the Respondent explained this inconsistency to her as part of his due diligence, she requested Mr. Merrill to move more into the High Yield bond fund which she already owned and liked. The decision was hers and was ok'd by her son Gaylen who she always consulted, yet who was never called upon to testify only her other son Clarke, ref. TR pg. 1692, lines 18-25, TR pg 1693, lines 8-22. And again, the fund was consistent with her financial objective. Since this client chose not to reveal her income or net assets (ref, Exhibit S-19, ACC 01529, TR pg. 1683, lines 22-25 & TR pg 1684, lines 1-7) as requested by her original Iowa financial advisor as well as by the Respondent, she was believed to have multiple holdings in other accounts for the following reasons: **a.** substantial investment in the Baptist Foundation as volunteered by her husband (also a client of the respondent), ref. TR pg. 565, lines 17-21 & TR pg. 568, lines 23-25, **b.** lived in an upscale condo in Scottsdale, ref. TR pg.558, lines 23-25, TR pg. 559, line 1, & TR pg. 561, lines 20-23 and **c.** did not use her MSDW account for writing checks to pay any bills or for depositing her Social Security, etc..

2. The High Yield Bond fund was a core holding for many Sun City residents because it provided a steady net asset value over time and an excellent fixed, monthly dividend for a total annual return over 10%. (Exhibit R-1, pgs. 1004, 5, 6). It was frequently praised and highly rated in the financial media including Forbes, Business Week , and Lipper (Exhibit R-1, pgs. 1001-1003, 1007, 1009). It was used by senior financial advisors in the office including Arizona State Senator Robert Blendu and the branch's assistant manager, ref. ref. TR 1556, lines 1-11, TR pg. 1659, lines 2-7 & Opinion pg. 11, lines 1-2. It was not, as implied in para. 80 of the ALJ Opinion that "all her eggs were in one basket". There were approximately 200 separate bond issues from a wide variety of companies and industries and with varied ratings as reflected in the prospectus. These factors put forth by the Respondent and reiterated in paras. 65, 66, 67 and 68 of the Opinion were not contradicted by the Securities Division.
3. The Respondent's branch manager also agreed with the above assessment by the Respondent and to the suitability of the transaction as required by the MSDW Branch Management Manual. Further there were "reasonable grounds" for suitability as required by both the NASD Rule 2310 and the Arizona Corporate Commission Rule R14-4-130. There exists no quantitative definition of suitability, no strike zone as in baseball so the umpire (or Judge) and the batter (or broker) have a frame of reference to determine ball or strike (suitable or unsuitable).
4. The Securities Division case for unsuitability was based on an "expert" witness , Mr Michael Donovan who only looked at the new account form as testified (ref. Exhibit S-19, ACC 01529 & TR pg.1036, lines 12-17). He did not talk to the client at any time nor was he ever in a supervisory / management position to evaluate suitability, ref. TR pg. 1022, lines 15-25. He paid no attention to the fund's high rating and performance (previously referenced in para. 2 above) nor the fact that this is a professionally managed **mutual fund** and is **by definition** a diversified investment. It historically holds approximately 200 separate bonds issued by leading U.S. companies such as Pepsi and Disney as well as zero coupon bonds, and that the default rate was in the 1996-1997 time period 1-2 % as stated in the bondmarkets.com web site. This constituted reasonable grounds for determining suitability.

5. There is nothing in either the Arizona Revised Statutes or Arizona Administrative Code which constitutes a standard or criteria for measuring how much restitution should be made when appropriate. No cases have been found setting forth any standard or criteria. This client's complaint was not made until after the Respondent left Morgan Stanley, and therefore he should not be held responsible for any fluctuation in account value after December 2000 when he no longer controlled the account, see para 9 below.
6. This client enjoyed considerable income from mid-1996 thru 2000 totaling \$ 30,605, refs. Exhibit S-23, ACC 04441, Exhibit S-24, ACC 02464, ACC 02399, Exhibit S-25, ACC 02403, Exhibit 26, ACC 02644. Like many investors, she wanted and received a good, high return but was unwilling later on to personally accept investment risk when the market turned. The client did, however, testify and expressed understanding that to get a greater return, she would be taking on more risk, ref. TR pg. 494, lines 19- 25 & TR 579, lines 9-11. This was discussed on more than one occasion with her in the context of the industry's investment pyramid, ref. Exhibit R-9, see examples of income asset categories delineated under Taxable Income on pg. 4, also TR pg.1562, lines.22-25, TR pg. 1563 lines.1-25, & TR pg. 1564, lines 4-21.
7. During the Fall of 2000, the Respondent contacted the client to inform her that the High Yield fund's net asset value was continuing to decrease in value due to the unique, broad downturn in the market. It was not alone. The fund's management also forecasted the fund's first decrease in its dividend. With this knowledge, he recommended a no cost transfer into the MSDW Information Fund which would continue to provide income thru the no cost MSDW Systematic Withdrawal program, TR pg. 1690, lines 18-25 & TR pg. 1691, lines 1-25. She approved the transfer. It was shortly thereafter it was recommended by MSDW that the Health Care fund be used to replace the Information fund because of its higher rating and performance noted by the independent Morningstar service.. This was approved also by the client again to provide income and enhance her account value. There was no cost to the client, and no compensation whatsoever went to Mr. Merrill since it was an internal mutual fund transfer.

8. Based on the above, restitution for the client is not warranted. The Respondent expended maximum effort to give all his clients what they wanted and what was consistent with their financial objectives. There were no Limited Partnerships, no Enrons, no Brazilian gold mines or options. He tried his best to respond to adverse market conditions to help the client and all his other clients to avoid significant losses. He advised in a timely fashion and gained approval when required. Mr. Merrill has suffered beyond all limits and all reason for trying to serve his clients. Any restitution is unwarranted, underserved, and unfair.
9. A calculation of restitution was requested by the ALJ from the Securities Division . Their calculation of restitution is conceptually and mathematically flawed and invalid for the following reasons:
 - a. The High Yield Bond fund was a suitable investment consistent with the client's documented financial objective of aggressive income, ref. Exhibit S-19, ACC 01529, her personal desire for more income and in the judgment of the MSDW Branch Manager. The fund was well diversified with nearly 200 issues, had an excellent industry rating based on performance and cost, ref. R-1, pgs. 1001-1003, 1007, & 1009 and had been used extensively to provide steady, predictable income for retired people in Sun City. These factors constitute "reasonable grounds " at the time and therefore, met the test of suitability, ref. TR pg. 2010, lines 23-24 & TR pg. 2011, lines 1-4
 - b. The Securities Division restitution calculation assumes the High Yield bond fund was unsuitable from day one yet it was considered suitable by ALJ Dion Opinion for Beatrice Du Chene. It was also requested and approved by the client to replace three growth mutual funds previously purchased in Iowa which were from day one inconsistent with her financial objectives. The question therefore is when did the High Yield Fund become unsuitable for this client?
 - c. Would leaving the account as it was, be suitable ?.....or would the client now be contesting those three funds which at the time she sought more income (Nov. '97) equaled 66.7 % of her portfolio, ref. Exhibit S-24, ACC 04360 and have since gone down consistent with the three year market decline. The Securities Division made no effort to

calculate the value of the account if these three growth mutual funds had been left in it.

- d. The Securities Division also failed to account for all checks written which removed \$ 31,465 of value from the account over time, ref. see subpara.h. below.
- e. They further imposed a 10% interest penalty thru 2002 yet provided no income derived for the years '01 & '02 during which Mr Merrill had no control of the account. I guess if the Respondent didn't have control, he shouldn't benefit from any income derived from the account, but just be penalized.?
- f. The stated liquidation date of 22 May 2002 was 17 months after the client's account was removed from the Respondent's control as confirmed by the Securities Div. withholding any credit for income derived after 2000. It was also 13 months after he left MSDW. The financial advisor cannot be held responsible for an account after the account has been transferred to the MSDW Branch Manager.
- g. If unsuitability is to be judged independent of asset performance, why does it only become an issue when the market goes down and asset values decrease? The client has a responsibility to express concern in a timely manner as required by each MSDW confirmation statement and not to wait over 5 years as she did., i.e.,

"Investors need to step up and assume more responsibility"

Mr. Jim Fox
Professor of Securities Law, Duke Univ.
Oct. 2001, Money Magazine

- h. As for total account performance under Mr. Merrill, the following is an accurate assessment to determine the positive value the client received... see references below

Account Value as of	31 December '00	\$ 37,957
Total of Income Received thru	" "	30,605
Total of Checks Written thru	" "	31,465
Total Value Received		\$ 100,027

Total Account Start Value	1996	\$ 67,626
Total of Added Deposits Made		<u>5,793</u>
Total Principal Investment		\$ 73,419

Total Overall Gain\$ 26,608
Annualized Gain 9.8 %

References:

Acc't Value 31 Dec.'00	Exhibit S-26, ACC 002298
Total Income Received	See para. 6 above
Total of Checks Written	'96 S-23, 04441
	'97 no exhibits, see ACC #s
	02424,02429, & 02449
	'98 S-24, ACC 02399
	'99 S-25, ACC 02403
	'00 S-26, ACC 02407

Total Acc't Start Value'96	ref. S-23, ACC 04441
Total of Added Deposits	ref. S-23, ACC 04441

- i. Based on the above, any request for restitution is unwarranted, undeserved, and unfair.**

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Line 25 -27 Administrative Penalty \$40,000

To date the Respondent and his family has suffered immensely from these claims. He has lost his source of livelihood at a most critical time of his life since his oldest son has an ongoing battle with non-Hodgkins lymphoma Cancer (three operations and six months of chemotherapy to date), and his wife has been diagnosed with Breast Cancer with one mastectomy operation to date and is possibly facing a second. Each has required special care and expensive treatments not covered by insurance. The Respondent has also been helping to pay for his oldest grandson's schooling since he has ADHD and requires special instruction.

When Morgan Stanley released the Respondent, it was coincident with a release of 1500 brokers as initially rumored and later verified by the Wall St. Journal (articles available). The Respondent's Branch Manager, Charlie Cajero, fully supported the Respondent, and expended great effort to keep him, but the timing was unfortunate as a regional quota had to be met, ref. TR pg. 1785, pgs. 14-16.


All claims against the Respondent came many months after so-called wrong investments were made and only after a downturn in the market had occurred. Some of the claims even surfaced after the Respondent was let go in April 2001, and therefore, he was unable to access extensive client files and documents to support his arguments against the claimants including early phone records which were archived in the Dean Witter Headquarters in World Trade Center #2 on 9/11, ref. TR pg. 1571, lines 2-17, TR pg. 1804, lines 4-25.

The extent of the Respondent's financial loss has been overwhelming. He has lost all his deferred bonus money (\$65,000) dating back to 1996, ref. TR pg. 1786, lines 17-19 plus all his Morgan Stanley stock options, all his monthly retirement pension, and health benefits, ref. TR pg. 1786, lines 19-25. He has nothing to show for his 8 years of devoted service, yet the work he did for all the claimants gave them the income and/or increased net worth over and above what they initially brought to Mr. Merrill. To date, his punishment has already far exceeded any misdeeds.

In view of the above, and in view of the very limited financial assets of the Respondent , the latter very respectfully requests that the Administrative Penalty be significantly reduced, e.g., the NASD penalty was \$5000. Reference is also made to ALJ Dion's opinion Para. 112, pg. 17 which cites Decision No. 57979, "*Boucher, Oehmke & Co.*" et. al. (7 August 1992) which recommended an Administrative Penalty of \$ 5000 yet the case involved many investors and several hundreds of thousands of dollars of contested assets.

Mr. Merrill wishes only to be able to care for his family which is under great financial and emotional stress. For justice to be served, it must above all else be fair.

RESPECTFULLY SUBMITTED this 14th day of November 2003.



Philip William Merrill
Respondent

ORIGINAL AND 13 COPIES filed
With Docket Control on 14 November 2003

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